MOTION FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-340

WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION AND BRIEF OF:

WESTERN SHOSHONE LEGAL DEFENSE AND EDUCATION ASSOCIATION, MARY DANN and CARRIE DANN

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION TO FILE BRIEF, *AMICI CURIAE*, IN SUPPORT OF PETITION

The Western Shoshone Legal Defense and Education Association, Mary Dann and Carrie Dann respectfully move for leave to file the attached brief, *amici curiae*, in support of the petition filed in this case.

The Association is an informal association of Western Shoshone Indians whose purpose is to provide legal

information and assistance to its members to enable them to preserve their traditional rights, values and religion. The Petitioner, Temoak Bands of Western Shoshone Indians, Nevada, is a federally recognized tribe comprised of that portion of the Western Shoshone who live on two colonies and one reservation. The majority of Western Shoshone Indians belong to other federally recognized organizations, a state organization, or follow the traditional way, unaffiliated with any government recognized political structure.

Mary Dann and Carrie Dann are Western Shoshone Indians who are members of the Association, but are not affiliated with the Temoak Bands of Western Shoshone Indians. The Danns, like many of their fellow tribesmen and their forebearers for thousands of years before them, use and occupy a portion of the aboriginal Western Shoshone lands which are the subject of this action. The Respondent United States, commenced an action against the Danns in 1974 in the United States District Court for Nevada, seeking trespass damages and an injunction forbidding their use of the land. *United States v. Dann*, U.S.D.C. Nev., No. 74-60 BRT. In that case the United States has sought to estop the Danns from asserting the unextinguished aboriginal title of the Western Shoshone based upon the findings and judgment of the Indian Claims Commission in this case. Despite the holding of the Court of Appeals for the Ninth Circuit that the Danns were not estopped and despite the remand of the case with direction to the district court to decide the title question in March 1978, 572 F2d 222, (Appendix B), the

United States has continued to urge the district court to not decide the validity of the Western Shoshone title and has repeatedly sought delay of that action with the apparent purpose of attempting to extinguish the Western Shoshone title by payment of the judgment in this case. (This case is discussed in the Petition at 16-17.)

In 1974, the Association joined with Frank Temoke, a traditional chief of the Western Shoshone, in attempting to intervene in this case before the Indian Claims Commission in order to remove claims for lands still owned and occupied by the Indians. The Commission refused to accept evidence concerning the alleged collusion, held an oral argument and denied the intervention because the allegations of collusion necessary to break the exclusive representative status of the Temoak Bands were not supported by any evidence. On appeal, the Court of Claims sustained that denial. *Western Shoshone v. United States*, 532 F.2d 495 (Ct. Cl. 1976). A petition for a writ of certiorari was made to this Court and denied. 429 U.S. 885 (1976). (That petition is attached in Appendix A).

The Association's members, particularly the Danns, have a direct interest in this case, for it is their land which will be taken from them, depriving them of their livelihood and destroying their culture and religion.

Although the Temoak Bands has now retained an attorney and petitioned this Court in an effort to protect the unextinguished title of all Western Shoshone, the Association and the Danns believe they can advance additional reasons for granting a Writ by analyz-

ing the ruling of the Court of Claims in light of the representational scheme of the Indian Claims Commission Act.[1] The Western Shoshone people are *not* changing their position. It is clear that the desire to maintain their lands and lifestyle was practically universal and consistent throughout the litigation.[2] The problem was, and is, that the procedures of the Indian Claims Commission were such that it was nearly impossible for the Indians to control litigation brought in their name.

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[1] As stated by the Court of Appeals for the Ninth Circuit regarding this case: "Some difficult issues are presented in deciding the identity of parties question in the context of tribal litigation before the Commission. (See **Fort Sill Apache Tribe v. United States**, 477 F.2d 1360, 1362 (Ct. Cl. 1973); **Cherokee Freedom v. United States**, 181 Ct. Cl. 7873 (1963). See also **Western Shoshone Legal Defense and Education Ass'n v. United States, supra**, 551 F.2d 495.)" **United States v. Dann**, 572 F.2d 222, (9th Cir. 1978), Appendix B at B-8, n. 1.

[2] At the oral argument on the Association's attempt to intervene, the former claims attorney for the Western Shoshone Identifiable Group, Robert Barker, admitted that throughout the litigation the Indians asserted a fear of "losing their land":

> They are closely attached to their land. They love the land and they don't want to give it up. If they feel there is any possible right they have in the land, they want to assert it. And I don't blame them.
>
> If we could assert restoration of the land, fine. This has been raised and I have said, take it up with your congressman.
>
> . . . .
>
> The answer has been very simple. We can't restore this land. Argument on "Collusion", Ind. Clms. Comm. transcript at 23, Nov. 16, 1974.

Since the Indian Claims Commission could not "restore" the land, and since the claims lawyers' contract, which they wrote, was limited to bringing a claim, the claims lawyers took upon themselves to tell the Indians that what they wanted to do was "impossible". The Indians did not, and do not, need to have their title "restored" — they need to protect the title they have from extinguishment by operation of the Indian Claims Commission Act. 25 U.S.C. 70u.

The Association and the Danns wish to stress the implications to due process of law which would follow if the Temoak Bands is not given the opportunity to correct the threatened injustice to the majority of Western Shoshone whose home lands were bargained away without their consent or opportunity to be heard. The Temoak Bands is not in a position to argue this point as effectively as the Association and the Danns because the difficulties originated with the Temoak Bands' former counsel, and the Bands' new counsel is not as familiar with the actual history of the litigation.

Respectfully submitted,

JOHN D. O'CONNELL
Attorney for Western Shoshone
Legal Defense and Education
Association, Mary Dann and
Carrie Dann.

In the Supreme Court of the United States

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BRIEF, *AMICI CURIAE*, OF WESTERN SHOSHONE LEGAL DEFENSE AND EDUCATION ASSOCIATION, MARY DANN and CARRIE DANN, IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

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The stay below was sought to correct a gross miscarriage of justice which resulted from the denying of access to the Indian Claims Commission to the majority of Western Shoshone Indians who have no political affiliation with the representative plaintiff in whose name the claim was brought seeking damages for the "taking" of lands which, in part, are still owned and used by the Indians. Refusal of the relief will result in a denial of due process of law 1

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In the Supreme Court of the United States

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF, *AMICI CURIAE*, OF WESTERN SHOSHONE DEFENSE AND EDUCATION ASSOCIATION, MARY DANN and CARRIE DANN, IN SUPPORT OF PETITION FOR CERTIORARI

The bizarre caption of the decision below is symptomatic of the disease which has permeated the litigation throughout. It reads: *The Temoak Band* (sic.) *of Western Shoshone Indians, Nevada,* Appellant, *v. The United States and The Western Shoshone Identi-*

fiable Group, Represented by the Temoak Bands of Western (sic.) *Indians, Nevada,* Appellees. (Appendix A of Petition). The Court of Claims having previously held that the Temoak Bands was the exclusive representative of the entire Western Shoshone Identifiable Group with the right to pursue a litigation strategy contrary to the interess of even a majority of other members of the Group,[1] places the Temoak Bands as an *adverse* party to the Identifiable Group when the Bands joins the majority of the Group in seeking to prevent the loss of lands still owned by the Western Shoshone. The convolution necessary to maintain an appearance that *somebody* is the plaintiff in this action results in the Temoak Bands appearing as a party on *both sides* of the lawsuit.

Counsel of record specified by both the court below and the Indian Claims Commission for the Western Shoshone Identifiable Group, *represented by* the Temoak Bands, is Robert W. Barker, despite the fact that the duly constituted tribal counsel of the Temoak Bands, on behalf of the Temoak Bands and the entire Identifiable Group, had filed pleadings *pro se* discharging Mr. Barker and dissolving the attorney-client relationship. (Appendix C). The Justice Department insisted that the Commission could not receive pleadings *pro se,* but that the plaintiff could only address the Commission

[1] **Western Shoshone Legal Defense & Educ. Ass'n. v. United States, 531 F.2d 495 (1976).**

through Mr Barker.[2] Mr. Barker insisted that he could not be discharged without the approval of the Secretary of the Interior.[3] The Interior Department ruled that tribes *could* discharge an attorney without approval, but refused the Bands' request for assistance in stopping Mr. Barker (Appendix D), leaving the problem for resolution by the Commission. (Appendix E). The Commission and Court of Claims avoided the issue and heard from *both* the discharged counsel and the new counsel retained by the Temoak Bands. (Petition, Appendices D, A).

The decision below castigates the Indians for their failure to "change their position" earlier. When the Temoak Bands spent three years duly following the Government's procedures in an unsuccessful attempt to discharge their attorney of record because he would not accept their directions,[4] how can they be criticized for delay in making their position known? If the Temoak

[2] Government's Response to Plaintiff's Motion to Stay Proceedings, filed Nov. 26, 1976; Government's Response to Additional Motion, filed approximately Jan. 31, 1977. This of course was consistent with the Government's position throughout that the Commission should ignore all communications made to the Commission, various agencies of the Executive Branch and members of Congress protesting the manner in which the claim was being presented. However, previously the Government argued, successfully, that the protests were not properly styled or presented to the correct authority. See, Oral Argument on "Collusion", Indian Claims Commission, Nov. 14, 1975, Transcript 44, 62. But when the Indians finally figured out how to formally address the Commission, the Government contended that only the "attorney of record" can do so, i.e., that it is impossible for clients to inform a tribunal that their attorney is not representing their interests.

[3] Motion of Counsel for Plaintiff, filed Jan. 26, 1976.

[4] Discharge of Counsel and Resolution of Business Council of the Temoak Bands, No. 77-TM-03, filed with the Commission on Nov. 15, 1976, and attached hereto in Appendix "C".

Bands, with the holding of the court below that it was the exclusive representative plaintiff, with its federally approved constitution and ties to the Bureau of Indian Affairs, and with the assistance of counsel, could not control its attorney of record, how were the majority of Western Shoshone who did not belong to the Temoak Bands to make their wishes known?

This case has clearly been out of control of the Western Shoshone Indians from its inception. The claims lawyer, Mr. Barker, has admitted before the Commission that at meetings conducted throughout the litigation the Western Shoshone expressed their desire to keep the land:

> . . . I have set forth in our brief a long history of presenting this to the tribe or Identifiable Group for decision. Where the issue was made, should we pursue to try to protect our land on whatever theory, you know, the Indians were afraid of losing their land. They are closely attached to their land and they don't want to give it up. If they feel there is any possible right they have in the land, they want to assert it. Indian Claims Comm., Oral Argument on "Collusion" Transcript 23, Nov. 14, 1974.

However, neither Mr. Barker or the numerous agents of the United States, to whom the Indians protested, mentioned to he Commission that the Indians did not want to exchange land for money until the Association obtained its own counsel and moved to intervene. The Western Shoshone people could neither control their lawyer nor effectively fire him. The "Western Shoshone Identifiable Group" is a mere shell with no structure of any kind, yet alone a government. It is in fact a front, a paper client for what the Commission regarded to be the real party in interest, a law firm with a strong financial interest in pushing the claim through.[5]

The procedural obstacles to intervention in the Commission, with the attendant denial of due process to members of the Identifiable Group with no political avenue of redress to the "representative plaintiff", are set out in the attached petition for a writ of certiorari (Appendix A) which was previously denied by this Honorable Court.[6] *That petition is resubmitted hereby as additional reasons for granting the Petition of the Temoak Bands.* While Constitutional infirmaties described therein are not squarely before the Court in this proceeding, the Temoak Bands request for a stay, in order for the parties to correct the miscarriage of justice resulting from the "selling" of other Western Shoshone Indians' land from under their feet, will enable the parties to cure the Constitutional infirmaties in the proceedings. Failure to permit the parties to take remedial

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[5] The Indian Claims Commission Act provides for a contingent fee. 25 U.S.C. 70n. In a claim for land taken by the United States, there is direct correlation between the amount of land the attorney can prove was taken and the size of his fee. Impecunious Indians wishing to preserve their title are confronted with lawyers having a "built in" conflict of interest, since the attorneys will be rewarded if they ignore the client and claim damages for the "taking". Proving the taking, of course, is made easy by the United States, which gains clear title. The Commission and Court of Claims have not compensated for this deficiency in the Act by increasing their vigilence. Stipulations as to the "taking" are routinely encouraged to facilitate the proceedings. See, e.g., **Western Shoshone Legal Defense & Educ. Ass'n. v. United States, supra,** at 500.

[6] **Western Shoshone Legal Defense & Educ. Ass'n. v. United States,** 429 U.S. 885 (1976).

action will not eliminate the problem — it will be forced into other forums where it will have to be litigated.[7]

The United States has no legitimate interest which would be prejudiced by a delay. In fact, as the guardian of its Indian wards, it has the obligation to see that Indians are not swindled. The court below surely perverts the spirit of the Chief Justice's remarks pertaining to courts' obligations "to see to it that dilatory tactics by neither party can frustrate speedy justice", (Petition, Appendix at 7a), by quoting them as justification for denying the parties the stay necessary to correct a gross miscarriage of justice.

CONCLUSION

The representational scheme of the Indian Claims Commission Act by its failure to provide access to individuals and groups who are bound by the result but lack any control over the "representative plaintiff" raises grave due process of law questions. (Developed in Appendix A). The deficiencies in the Act as applied in this case will result in a gross miscarriage of justice by depriving many Western Shoshone of their land, livelihood and culture. These deficiencies can be corrected by the parties. The interest of the court below in

[7] The Government's attempts to use "collateral estoppel" to keep Western Shoshon Indians from asserting their title in **United States v. Dann**, 572 F.2d 222 (9th Cir. 1978) (Appendix B), will of course take on new vigor and strength by operation of the bar provisions of the Indian Claims Commission Act, 25 U.S.C. 70u. "The difficult issues . . . presented in deciding the identity of parties . . . before the Commission," noted by the Court of Appeals in **Dann, supra**, Appendix B at B-8, n. 1, will not be eliminated by the payment of the claim into the Treasury. Payment will render an equitable decision more difficult, both legally and politically.

"speedy justice" is not sufficient reason to deny the parties the opportunity to achieve true justice.

The Western Shoshone People implore this Honorable Court to grant the Petition of the Temoak Bands and summarily reverse the court below with instructions to grant a stay until the validity of the Western Shoshone title to what is left of the desert lands they have used and occupied for over ten thousand years is determined.

Respectfully submitted,

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October, 1979.

APPENDIX A

In the Supreme Court of the United States

OCTOBER TERM, 1976

No.

WESTERN SHOSHONE LEGAL DEFENSE AND EDUCATION ASSOCIATION, AND FRANK TEMOKE,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, AND THE WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners, Western Shoshone Legal Defense and Education Association and Frank Temoke, petitioners to stay proceedings and appellants in the courts below, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Claims herein.

OPINIONS BELOW

The opinion of the Indian Claims Commission dis-

missing the Petition to stay proceedings and for leave to present an amended claim is reported at 35 Ind. Cl. Comm. 457, and is set forth at page 1a of the Appendix to this Petition. The opinion of the United States Court of Claims affirming the decision of the Indian Claims Commission, decided February 18, 1976, is reproduced at page 28a of the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Claims was entered on February 18, 1976. A timely motion for rehearing was denied on April 23, 1976. The jurisdiction of this Court is invoked under the provisions of Title 23 U.S.C. §1225(1). The time for filing this Petition expires July 22, 1976.

QUESTIONS PRESENTED

1. Whether the Constitutional requirements of due process are met when interested Indian beneficiaries who are not members of the representative organization conducting litigation in their behalf, and do not agree with factual contentions which are advanced in their behalf and which are adverse to their property interests, are not afforded notice and an opportunity to be heard and present evidence?

2. Whether the due process requirements of notice and an opportunity to be heard may be limited by provisions of the Indian Claims Commission Act requiring a showing of "collusion"[1] as a prerequisite to notice and hearing?

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[1]Section 10, Indian Claims Commission Act, 25 U.S.C. §70(i).

3. Whether present possessory and treaty rights of native Americans to real property can be barred by laches, first, within the concepts of sovereign immunity and the wardship relationship and, second, where the "delay" cited is 23 years of efforts by claims counsel to achieve a different result than desired by the Indian beneficiaries?

STATUTES INVOLVED

Pertinent provisions of Sections 10, 17 and 22 of the Indian Claims Commission Act, respectively, are as follows:

25 U.S.C. §70(i)

> Presentation of Claims. Any claims within the provisions of this Act may be presented to the Commission by any members of an Indian tribe, band or other identifiable group of Indians, as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion or laches on the part of such organization be shown to the satisfaction of the Commission.

25 U.S.C. §70(p)

> The Commission shall give reasonable notice to the interested parties and an opportunity to be heard and to present evidence before making any final determinations upon any claim.

25 U.S.C. §70(u)

> When the report of the Commission determining any claimant to be entitled to recover has

been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

STATEMENT OF THE CASE

Petitioners are Western Shoshone Indians who, as members of the Western Shoshone Identifiable Group, are bound by the proceedings initiated in 1951 by the Temoak Bands of Western Shoshone Indians, on behalf of the entire anthropologically defined[2] Western Shoshone Identifiable Group before the Indian Claims Commission, seeking compensation for the taking of Western Shoshone lands by the United States. The Temoak Bands is an Indian Reorganization Act Corporation limited to the Western Shoshone Indians of the Elko Colony and

[2]Under the Indian Claims Commission Act, the claimant may be a tribe, band or "identifiable group". The latter term includes an aggregation of descendents of an Indian Band from whom the claim derives. Such a group need not have any political structure or other organization. See, e.g., *Red Lake and Pembina Bands v. Turtle Mountain Band of Chippewa Indians*, 355 F.2d 936 (Ct. Cl. 1965).

South Fork Reservation, Nevada. The great majority of Indians constituting the remainder of the Western Shoshone Identifiable Group, and whose interests petitioners are attempting to protect, do not belong to the Temoak Bands or any other Indian Reorganization Act Corporation and reside in scattered settlements throughout their ancestral desert homeland.[3]

Prior to, and throughout, the claims proceedings before the Indian Claims Commission, the petitioners and their predecessors have repeatedly informed the Claims Attorney representing the Identifiable Group, agents of the United States and the Temoak Bands that they objected to the inclusion, within the claim, of approximately twelve million acres of land to which they still assert unextinguished aboriginal and treaty title.[4]

[3]Due to their remoteness and their willingness to concede access to those small parts of their lands which the white man thought had value in the Treaty of Ruby Valley of 1863, 18 Stat. 689 (1875), the Western Shoshone were never rounded up like most Indian tribes, but, for the most part, remained in their native valleys and clung to their traditional language, customs, religion and social organization. Petitioners alleged and made proffers of evidence below, that Petitioner Frank Temoke is a traditional chief of the Western Shoshone and that the majority of Western Shoshone people support the position of the Petitioner Association in seeking to preserve their rights not ceded in the Treaty of Ruby Valley. No one claims that these "traditional" Western Shoshone people are subject to the authority of or have any political ties with, the Temoak Bands, except by their arbitrary and unconsenting joinder in this litigation. While the United States may find it easier to do business with the English-speaking and government organized Temoak Bands Business Council, it has not claimed that the "traditional" Western Shoshone people are legally non-persons or that they do not have a right to maintain their traditional social and political organization.

[4]The validity of petitioners' substantive theory of unextinguished title is not involved in this case, since petitioners were never given the opportunity of presenting it to the Commission below and, therefore, must be taken as true for the purposes of these pro-

Despite these protests, the Temoak Bands, the Claims Attorney and the United States neither removed these lands from the claim nor made any effort to litigate the issue of whether or not present title to these lands rested with the Western Shoshone or the United States.[5] In the event that the claim as constituted proceeds to final judgment and award, petitioners and all other members

ceedings. The Court of Claims noted that petitioners' position in this regard was not "overwhelming or clear as day" but an "open question which could be decided either way" (App. 46a). The Court of Claims simply believed that the abandonment of this claim of title to twelve million acres of ancestral lands was a decision the Representative Organization was entitled to make despite the protests of the alleged majority of owners who did not belong to the Representative Organization *Id.* (App. 46a). It should be noted that petitioners proffered to prove and submitted an affidavit by an officer of the Temoak Bands, that a decision electing remedies was never made by *any* Western Shoshone Indians, including the Temoak Bands. The Claims Attorney and agents of the United States represented to the Indians that there was no choice but to seek monetary compensation.

[5]The claim, as presented by the Temoak Bands, alleged aboriginal ownership of the lands in question and that large portions of the lands had been disposed of by the United States to settlers or others, or had been seized by the United States. The United States denied that the Western Shoshone had ever had title and in 1957, the Commission tried the issue of whether the Indians had had aboriginal title. In 1962, the Commission decided that the Indians had held aboriginal title to 24,396,403 acres in Nevada and California. Neither party alleged continuing title in the Indians to any of the land nor was any evidence produced pertaining to how the United States extinguished the Indians' title. Relying upon the representations of the parties, the Commission found that: ". . . the United States, without payment of compensation, acquired, controlled, or treated these lands . . . as public lands from a date or dates long prior to this action to be hereinafter determined upon further proof unless the parties agree upon a date." The necessity of "further proof" regarding the taking was obviated by the parties stipulating to an "average evaluation date" of 1872. The issue of the value of all the land as of 1872 was tried in 1967 and a decision awarding the Indians $26,550,000.00 was reached on October 10, 1972. The claim is presently awaiting decision of the issue of offsets.

of the Western Shoshone Identifiable Group will be forever barred from asserting their claim of title to these lands[6] which will not only deprive them of their property but will destroy their culture which is based on an unusually strong religious and psychological attachment to their land.

In April, 1974, petitioners filed a Petition with the Indian Claims Commission requesting a stay of proceedings and the opportunity to amend the claim to remove the lands to which they claimed title. In order to obtain access to the tribunal in the face of the exclusive representation provisions of the Act,[7] the Petition alleged that the United States and the Temoak Bands were acting in collusion by representing to the Commission that the United States had taken these lands when, in law and fact, they still belonged to the Western Shoshone. After the filing of responsive pleadings denying the collusion, the Commission held an oral argument limited to the issue of the definition of "collusion". The Commission denied petitioners the opportunity to present evidence in any form prior to or at that hearing.[8]

[6]Section 22 of the Indian Claims Commission Act, 25 U.S.C. 70(u), provides that payment of any claim, after a determination under the Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy. The respondent United States has sought, albeit prematurely, to use the interlocutory Commission rulings to bar members of the Petitioner Association from asserting the Western Shoshone title to some of these lands as a defense to efforts of the United States to obtain an order forbidding Indians' use of the lands. *United States v. Dann,* (U.S.D.C. Nev. R-74-60, BRT, pending).

[7]Section 10, Indian Claims Commission Act, 25 U.S.C. §70(i).

[8]Petitioners repeatedly requested an evidentiary hearing to settle the contradictory factual assertions raised in the exchange of pleadings. Prior to the "oral argument on collusion", counsel for

Following the oral argument, the Petition was dismissed by the Indian Claims Commission. An appeal from that decision was taken by petitioners to the Court of Claims which affirmed the decision noting that it was "impressed by two intertwined and striking sets of facts". First, that petitioners' motion was filed twelve years after the Commission had decided the land had been taken, and second, that the petitioners were aware for a long time of the position taken by the Claims Attorney. (App. 34-35a).

Before both tribunals, petitioners argued that they were entitled to the basic notice and hearing rights required by the due process clause of the Constitution and that the notice, hearing and exclusive representation provisions of the Indian Claims Commission Act must be interpreted consistent with those rights.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION PRESENTS IMPORTANT CONSTITUTIONAL QUESTIONS

the Commission instructed petitioners' attorney that the Commission would accept no evidence and that argument would be restricted to the definition of the term "collusion". (Transcript, Oral Argument before Indian Claims Commission, November 14, 1974, pp. 15, 56, 67-68) Throughout the decision of the Court of Claims below, that court complains of petitioners' failure to support its allegations and proffers of proof with affidavits or evidence despite the express refusal of the Commission to accept such evidence. Affidavits were attached to the briefs submitted to the Court of Claims rebutting those attached to the brief of the Claims Attorney. The Commission did not call for proffers of proof nor was there a formal opportunity for making them. Such proffers of proof as are in the record appear as answers to questions or to rebut self-serving factual statements advanced by the Claims Attorney.

CONCERNING DUE PROCESS UNDER THE EXCLUSIVE REPRESENTATION PROVISIONS OF THE INDIAN CLAIMS COMMISSION ACT.

In passing the Indian Claims Commission Act, it is apparent that Congress intended to provide a vehicle whereby Indian groups could obtain compensation and the United States obtain a release of liability for past wrongs done to the Indians by the government. However, the interpretation placed upon the exclusive representation provisions of the Act and the mode of intervention procedure imposed by the Indian Claims Commission and Court of Claims in this case, has converted the Act into another instrument capable of perpetrating new wrongs upon native Americans.[9] The process of separating Indians from their lands by finding some unauthorized Indian willing to sell land on behalf of other Indians is ancient and was condemned by the judicial branch even in the nineteenth century. See *United States v. La Chappelle,* 81 F. 152 (1897). To reinstitute this fraudulent practice and legitimize it in the name of judicial expediency, not only perverts the Indian Claims Commission Act, but actively involves the judicial branch in what has historically been the exclusive shame and dishonor of the executive and legislative branches. This cannot be done without violating the fundamental Constitutional precepts of due process of law which protect all Americans. This

[9]The danger of abuse is further heightened by the fact that claims counsel are compensated in proportion to the size of the monetary award, 25 U.S.C. §70(n), providing incentive to such counsel to prove that as much of their clients' land as possible now belongs to the United States.

Court should issue a Writ of Certiorari to review the decisions below in order to protect the integrity of the courts of the United States, establish that the Anglo-American derived concept of due process extends across cultural as well as raciol boundaries, and to reaffirm the procedural right of all Americans involved in representative actions.

In 1962, the Indian Claims Commission found that the Temoak Bands had the right to act as exclusive representative on behalf of the entire Western Shoshone Identifiable Group (App. 37a)[10] and the Court of Claims in its decision below, held that petitioners must show "fraud, collusion, or laches" pursuant to Section 10 of the Act,[11] in order to gain independent access to the Commission (App. 37a). The wording of Section 10 seems to indicate that Congress intended a tribal organization to be the exclusive representative of the entire tribe, band or

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[10]This finding was apparently predicated upon the approval of the Temoak Bands charter by the Secretary of the Interior pursuant to the Indian Reorganization Act, 25 U.S.C. §477, and the assumption that it is constitutionally permissible for the Secretary, quite arbitrarily, to bind unconsenting Indians such as petitioners to an "exclusive representative." That is so because neither the findings of the Commission nor the determination of the Secretary even purport to determine the adequacy of representation that this Court said was a necessary prerequisite to representative proceedings in *Hansberry v. Lee*, 311 U.S. 32 (1940). Moreover, the record is devoid of any evidence to support the lower courts' conclusion that the Secretary conferred authority on the Temoak Bands to maintain this suit on behalf of other Western Shoshone Indians who are not members of the Temoak Bands. The approval by the Secretary of the Indian Reorganization Act Corporation conferred authority to generally represent its members, but it did not confer such authority as to the entire group of Western Shoshones who were plainly not its members. Even as to its own membership there is no evidence that the Temoak Bands was "recognized" for the purpose of bringing this suit.

[11]25 U.S.C. 70(i).

group only where the Secretary had recognized the authority of the tribal organization as the general representative of "such tribe, band or group", that is, where the tribal organization and the claiming entity were coextensive, and all the members of the entity would have political redress through the channels of the tribal organization.[12] However, the Commission and the Court of Claims in the instant case, have interpreted Section 10 so that any "recognized" tribal organization has the privilege of exclusively representing an entire "identifiable group," regardless of whether the tribal organization is coextensive with the claimant group or, as in the instant case, is merely a minority sub-group, which happens to have a federally approved charter to govern the subgroup. Whether created by Congress or judicial interpretation, the result is a form of class or representative action where most members of the "identifiable group" have no political or other internal mechanism to control the representative before the Commission. However, neither the Act nor the Rules of the Indian Claims Commission contain the numerous safeguards provided non-appearing members of class actions in Rule 23, Federal Rules of Civil Procedure, and available to intervenors generally under Rule 24, Federal Rules of Civil Procedure.

Under Section 10 of the Act, the only exception to the exclusive privilege of representation is where "fraud, collusion, or laches" is shown to the satisfaction of the Commission. While the issue was thus cast in terms of

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[12]Prior to the instant case, this was the interpretation of Section 10 adopted by the Court of Claims. See *Turtle Mountain Brand of Chippewa Indians v. United States*, 490 F.2d 935, 954 (Ct. Cl. 1974 [Discussed n. 18, (App. 48a)]

"collusion", in reality the question was one of "access" involving "notice" and "opportunity to be heard and present evidence". Therefore, petitioners sought an interpretation of "collusion" which would give them the opportunity to appear simply because the representative entity and the United States were concurrently, and in petitioners' view, falsely maintaining that title to their lands had passed to the United States. Petitioners contended that such an interpretation, permitting access to the tribunal which was adjudicating their rights, was mandated by the holdings of this Court pertaining to the due process rights of non-appearing members of representative actions, e.g., *Eisen v. Carlisle & Jacquelin,* 416 U.S. 156 (1974); *Mullane v. Hanover Bank and Trust Company,* 339 U.S. 306 (1950); *Hansberry v. Lee,* 311 U.S. 32 (1940).

The Commission and the Court of Claims below rejected this construction in favor of giving the representative organization, the Temoak Bands, a free hand, regardless of the contrary interests of the remainder of the Identifiable Group. The vice in such a construction is obvious, and the Constitutional objections which are of concern to this Court are clear, when the lower courts' reading of the "collusion" provisions of Section 10, as obviating the "notice" and "opportunity to be heard" provisions of Section 17, are considered. The result is that neither the Act nor the Rules of the Indian Claims Commission afford the numerous safeguards provided non-appearing members of class actions in Rule 23, Federal Rules of Civil Procedure, and available to intervenors generally under Rule 24, Federal Rules of Civil Procedure. This Court

should consider if a reading of Section 10 which does not incorporate those safeguards is Constitutionally permissible. E.g., *Smith v. Swarmstedt,* 16 How [57 U.S.] 288, 302-3 (1853).

Nor is the question limited to Indian claims under the Act. Native Americans, among other minorities, are increasingly involved in representative proceedings before the federal district courts. Recent decades have also seen a proliferation of representative proceedings in the form of class actions, shareholders' derivative suits, and representative actions by protective committees or similar organizations such as in the areas of consumer and environmental protection. The expanding use of doctrines such as collateral estoppel also require careful consideration of safeguards in representative proceedings.

In the alternative to their request for a liberal construction of the term "collusion", petitioners also requested an opportunity to produce evidence before the Commission showing "collusion" between the United States and Counsel for the Temoak Bands under *any* definition of that term. However, the Commission declined to either liberally interpret "collusion" between the United States and counsel for the Temoak Bands and grant a hearing on the title question, or hold an *evidentiary* hearing on the threshold question of "collusion" as defined by the Commission. Instead, the Commission adopted the Black's Law Dictionary definition of "collusion" and then, *based solely on the evidence put in the record by the parties charged with collusion,* found that no collusion had been shown. (App. 9-16a)

It is respectfully submitted that this Court should

issue a Writ of Certiorari to determine if Indian claimants who are before the Indian Claims Commission as members of an "identifiable group" have the right to independent access to the Commission where they have no political or other control over the representative organization, and that organization, in agreement with the United States, is taking a position adverse to the property interests of those seeking access. In other words, do Indians have the minimum right to access to the tribunal affecting their property interests which this Court has guaranteed to other Americans? If not, and if Indian claimants have the burden of proving an actual secret, collusive agreement in order to gain access, this Court should decide whether such Indians have, at least, a basic due process right to present evidence to meet the burden of proof.

The action of the Court of Claims proceeds on the assumption that petitioners are bound by the 1967 decision of the Commission concerning the value of Western Shoshone lands, entered pursuant to the 1966 stipulation of the Identifiable Group and the government on the valuation. That might well be so had petitioners been accorded notice and an opportunity to be heard at that time, but the disposition by the Court of Claims merely begs that crucially important question. In fact, the issues of notice and opportunity to be heard were scarcely addressed, and petitioners were given no opportunity — despite their request — to adduce evidence.

The issue is one addressed to the Constitutional requirement of procedural due process. This Court has said that when a state adopts a procedure for representative proceedings, the requirements of due process are that

"the procedure [be] so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure full and fair consideration of the common issue", *Hansberry v. Lee*, 311 U.S. 32, 43 (1940). Is the requirement any less if the representative procedure is devised by an act of Congress and judicial interpretation, or if it is Indian rights at issue rather than those of a black minority?

It is apparent that Congress did not intend to deny interested parties access to the Indian Claims Commission. Section 17 of the Indian Claims Commission Act declares that "interested parties" are entitled to "notice" and an "opportunity to be heard and to present evidence".[13] In other settings, those words have been held to require notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank and Trust Company*, 399 U.S. 306, 314 (1950). See also, *Eisen v. Carlisle & Jacquelin*, 416 U.S. 156 (1974).

The holdings of the lower tribunals in this case, effectively repeal Section 17 of the Act while enhancing the barriers to access to the Commission created by the exclusive representation provisions of Section 10 of the Act. The Court of Claims, without so much as an inquiry into whether actual notice had been afforded petitioners, and without any consideration that the case was not at the

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[13]25 U.S.C. §70(p).

final judgment stage,[14] concluded that petitioners were chargeable with notice of the legal niceties of these proceedings and bound by their failure to directly contact the Indian Claims Commission at an earlier date. To the contrary, this Court has said that:

> ". . . when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." *Eisen, supra,* at 315.

The Court of Claims recently declared that "the jury is not yet in" on the binding effect of class judgment on absentees." *Quinalt Allottee Ass'n v. United States,* 453 F.2d 1272, 1275 (Ct. Cl. 1972). This Court, in *Eisen v. Carlisle & Jacquelin,* 416 U.S. 156 (1974), supplied the missing verdict that class members are entitled to careful notice and an opportunity to withdraw. The disposition of this matter by the lower courts is inconsistent with that important recent precedent, at least if due process is the same in these related settings. If it is not, and Indian groups are to be subjected to second class due process, such a radical exception to one of the of the most funda-

[14]The Court of Claims has previously held that the interlocutory decisions of the Indian Claims Commission are not final judgments and can be modified at any time up to the final report of the judgment to Congress. See *Caddo Tribe of Oklahoma v. U.S.* 140 Ct. Cl. 63, 81 (1957).

mental precepts of the Constitution should only be implemented after review by this Court.

II.

THE LOWER COURTS' TREATMENT OF THE LACHES QUESTION SO FAR DEPARTS FROM ACCEPTED PRACTICE THAT REVIEW SHOULD BE GRANTED.

The Court of Claims, with commendable candor, acknowledged its decision to be based upon the supposed laches of petitioners in (1) filing their Petition twelve years after the Commission's determination that title was extinguished (App. 34a), and (2) in that petitioners were aware "for a very long time" of the position that had been taken by Claims Counsel (App. 35a). Yet there is no suggestion that any party is prejudiced by the delay, or that the delay was unreasonable, measured by petitioners' degree of sophistication or access to independent legal counsel.[15] There is also no suggestion of any legal or pro-

[15]At App. 43a, the Court of Claims alludes to "prejudice to the other parties," but no such prejudice is recited and in context it is clear that the Court had reference to the investment in time by claims counsel. While the Indian Claims Commission Act in Section 15, 25 U.S.C. 70(n) provides for compensation of Claims Attorneys in proportion to the size of the award, that is, the amount of Indian land such counsel can show has been taken by the United States, there is no provision for providing legal assistance to Indian groups who wish to preserve claims of title to land or, at least, test the validity of such title before accepting compensation. Until recently, the obtaining of counsel to undertake litigation of this size was practically impossible for traditional Indians. Documents submitted to the Commission and Court Claims show repeated attempts by petitioners to obtain independent counsel over many years.

cedural barrier to the Commission entertaining the proposed amended claim, however late it had been asserted and, indeed, there was no legal barrier to amendment of the claim since the case had not yet reached the final judgment stage.[16] To the contrary, the Court of Claims based its ruling on laches on prejudice to the Claims Attorney:

> On this Nevada-land phase of the Western Shoshone claims there was very little left to do; much time had passed, and much had been done. (App. 35a)
>
> The members claiming to represent the majority interest are required to make their position formally known to the Commission and the other parties as soon as possible—and not after much work has been done, and years have passed . . . It is far too late . . . to upset the applecart after the fruit has been so carefully collected and piled . . . (App. 50a)

The respondents' concern over delay which would occur if petitioners were afforded their day in court seems less than genuine when the amount of time those parties have been willing to consume in their efforts to keep petitioners from being heard is considered. It should also be noted that there would have been no delay if the respondents had timely notified the Commission themselves that petitioners were asserting title to the twelve million acres.

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[16]The "collusion" exception to the exclusive representative provisions of Section 10, 25 U.S.C. § 70(i) does not contain any time limitation and the Court of Claims has previously held that the interlocutory decisions of the Indian Claims Commission can be modified at any time up to final report to Congress. See *Caddo Tribe of Oklahoma v. United States*, 140 Ct. Cl. 63, 81 (1957).

The lower courts' treatment of the laches issue so far departs from accepted legal principles, in at least three respects, that review by this Court is appropriate.

First, the doctrine of laches is based upon the principle that asserting a stale claim will cause prejudice "to an adverse party."[17] If that doctrine is to be expanded to protect the investment of time by counsel in achieving a result not desired by the litigant, or the inconsistent efforts of a tribunal which is invested with the responsibility of preserving the claim, the wisdom of such an extension merits the attention of this Court.

Second, the doctrine of laches is normally not invoked against Indian claimants because of their wardship relation with the sovereign. It is axiomatic, of course, that laches may not be invoked against the sovereign, or against Indians when they assert rights that might be asserted for them by the sovereign. See Brief of U.S., Amicus Curiae in opposition to Petition for Certiorari in *Capital Grande Band of Indians v. Helix Irrigation Dist.*, Docket No. 73-2956 (October Term, 1973). If laches is to be invoked against Indians by the United States in pressing their claims, it should be only after this Court has examined the wisdom of such a change in the policy of the law.

Third, counsel for the Identifiable Group, the Temoak Bands, and various agents of the United States had been informed before, and throughout the litigation, that petitioners and their predecessors wished to assert their title rather than seek money for their lands. That

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[17]E.g., 27 Am Jur, Equity, §152.

these parties succeeded in keeping the Commission uninformed that the owners of the land were objecting, and relied upon the inability of isolated and impoverished Indians to secure independent counsel to make a formal presentation, is certainly not reason to give them the equitable protection of laches.

CONCLUSION

This case presents issues of procedural due process in representative actions which are of great importance in view of the burgeoning utilization of such actions as society becomes more complex. The goal of procedural due process is, at least, to give those affected by litigation an opportunity to be heard in protection of their interests. The interests involved in this case are of the greatest magnitude—in dollar terms by Anglo-American values, and in terms of cultural survival by traditional Western Shoshone values. The national publicity associated with this case is indicative of the interest all Americans have in seeing whether the Indian Claims Commission Act is a sincere attempt to remedy centuries of wrongs against Native Americans or just another scheme for spending taxpayers' money primarily for the benefit of the implementors of the system. These aspects of the Indian Claims Commission Act have not been previously examined by this Court.

It is respectfully submitted that this Court should issue a Writ of Certiorari not only to clarify the rights

of persons bound by representative proceedings, but to establish the integrity and credibility of the judicial branch of government in the eyes of all Americans.

Respectfully submitted,

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APPENDIX B

United States Court of Appeals Ninth Circuit

Appeal No. 77-1696

(Decided March 15, 1979)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARY DANN and CARRIE DANN,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Nevada

Before: BROWNING and HUFSTEDLER,
Circuit Judges, and BONSAL*, District Judge

PER CURIAM:

The Danns, who are Western Shoshone Indians, appeal from a judgment in favor of the Government in an action brought by the Government for trespass. The Dann's were charged with grazing their livestock on federal lands in the Elko Grazing District without a

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* Honorable Dudley B. Bonsal, United States District Judge, Southern District of New York, sitting by designation.

permit from the Bureau of Land Management. The Danns admitted that they had grazed the livestock on the lands, but they alleged that the Bureau lacked authority to exclude them because the lands were beneficially owned by the Danns and other members of the Western Shoshone Tribe. The Government and the Danns moved for summary judgment, and the district court granted the Government's motion. The district court held that collateral estoppel foreclosed the Danns from asserting that they had title to the lands because the Indian Claims Commission, in proceedings before the Commission on behalf of the Western Shoshone, had ruled that the lands had been acquired by the United States and that the Indians' title has been extinguished. The district court enjoined the Danns from grazing their livestock on the lands without proper federal authorization and assessed them $500.00 damages. This appeal followed.

Two issues are raised on appeal: (1) Are the Danns collaterally estopped from litigating the title of the Western Shoshone Tribe to the lands in question by the decision of the Indian Claims Commission; and (2) if the title issue is not precluded, do the Western Shoshone hold beneficial title to the lands? We hold that the proceedings before the Indian Claims Commission did not foreclose litigation of the title issue. We decline to reach the title question, and we remand the case to the district court for the purpose of deciding title.

A brief description of the factual background of this dispute is useful in understanding the nature of the

issues which are presented before us. When the Treaty of Guadelupe-Hidalgo was signed in 1848, the Shoshone Nation used and occupied about 80 million acres of land, which now form parts of Idaho, Nevada, Utah, Colorado, and Wyoming. In northern and central Nevada, the Western Shoshone occupied 22 million acres of land. As non-Indian settlers moved across and settled in these areas, disputes erupted between the Indians and the non-Indians. In 1862, President Lincoln appointed a special commission to negotiate a peace treaty with the Shoshone. The commissioners were instructed specifically, on July 22, 1862, "that they were not expected to negotiate for the extinction of the Indian title but for the security of roads over the lands and 'a definite acknowledgement as well of the boundaries of the entire country that they [the Indians] claim.'" (*Northewestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 347 (1945).) The commissioners eventually negotiated five treaties between July and October, 1863, with different Shoshone groups: Treaty of Fort Bridger with the Eastern Bands, Treaty of Box Elder with the Northwestern Bands, Treaty of Tuilla Valley with the Shoshone-Goship Bands, Treaty of Soda Springs with the Mixed Bands of Bannocks and Shoshone, and Treaty of Ruby Valley with the Western Bands. The only treaty directly involved in this case is the Treaty of Ruby Valley, signed October 1, 1863, and ratified as amended October 21, 1869 (18 Stat. 689).

Under the Treaty of Ruby Valley, the Western Shoshone agreed to the safe passage of white emigrants

and travelers across their country, to the establishment of military posts and telegraph, overland stage and railway lines, and to the opening of their lands to prospecting, mining, farming, and ranching by whites. The Treaty also defined the boundaries of the Western Shoshone land, and provided that whenever the President "shall deem it expedient" to provide reservations for the Western Shoshone "within the country above described" the Indians would remove themselves to those reservations.

By 1872, about 20 thousand non-Indians resided within the Shoshone tract. The increasing displacement of the Indian population led President Hayes to create a reservation for the Western Shoshone at Duck Valley. However, the Duck Valley Reservation was outside the Western Shoshone territory, and not "within the country above described" in the language of the Treaty of Ruby Valley. A small minority of Western Shoshone moved to the Duck Valley Reservation. As of 1973, the preponderance of the Western Shoshone people still lived within the tract described by the Treaty of Ruby Valley, which had been occupied by their ancestors a century earlier.

In 1945, Congress enacted the Indian Claim Commission Act (25 US.C. §§ 70, *et seq.*) which created the Commission ("ICC") to hear and decide claims brought upon behalf of the various Indian tribes against the United States, including "claims arising from the taking of the United States, whether as a result of a treaty of cession or otherwise, of lands owned or occu-

pied by the claimant without . . . payment . . . or compensation." (25 U.S.C. § 70a.) ICC decisions were reviewable by the Court of Claims. Upon the filing of the ICC's report with Congress, in which the Commission decided that the Indian claimants had a right to compensation, followed by congressional appropriation to pay the claim and the acceptance of that fund, the claimant's action was deemed finally determined and the claim itself was deemed fully discharged by the United States. (25 U.S.C. § 70u.)

In 1951, various Shoshone tribes brought an action before the ICC claiming damages for the deprivation of their former tribal lands. (*Shoshone Tribe of Indians of the Wind River Reservation, Wyoming, et al. v United States,* ICC Docket No 326.) One of the co-petitioners in that proceeding is the Temoak Band of Western Shoshone, who brought suit as the representative of the Western Shoshone. Paragraph 25 of that complaint charged that the United States, in violation of the rights of the Western Shoshone and the provisions of the Treaty of Ruby Valley, "has disposed of a large part" of the land described in the Treaty of Ruby Valley "to settlers and others, or has seized and converted a large part of the said lands to its own use and benefit, without any compensation . . . ." (*Quoted in Western Shoshone Identifiable Group v. United States*, 35 I.C.C. 457, 461-62 (1975).) The ICC in 1962 rendered an interlocutory decision in which the Commission said that the Western Shoshone constituted an identifiable group, that they had had exclusive use and occupation of, and, hence, aboriginal title to 22 mil-

lion acres in Nevada, including the acreage involved in the present case. The ICC also noted that "the United Staes, without payment of compensation, acquired, controlled, or treated these lands as if they were public lands." (Finding 26, *Shoshone Tribe, supra*, 11 I.C.C. at 416.) A stipulation was entered in 1966 in which the parties agreed that July 1, 1872, would be deemed the date of taking for the purpose of valuation, and, in 1972, the Commission entered another interlocutory order setting the value of the land as of the stipulated dated. (*Western Shoshone Identifiable Group v. United States*, 29 I.C.C. 5 (1972).)

In 1974, a group of Western Shoshone, including the Danns, who did not belong to the Temoak Band, tried to intervene in the proceeding before the ICC, in order to remove from the pending claim certain lands, including those which are the subjects of this litigation. The ICC rejected the intervention petition, and that decision was affirmed by the Court of Claims. (*Western Shoshone Legal Defense & Education Ass'n v. United States*, 531 F.2d 495 (1976).) As the Court of Claims observed, the intervention effort sprang from an intertribal dispute among the Western Shoshone "over the proper strategy to follow in this litigation," *i.e.*, whether to claim that their lands had been taken by the United States and that substantial compensation was therefore due, or to insist that the lands had never been taken and are still owned by the Indians. (*See* 531 F.2d at 503)

In November, 1976, the Temoak Bands changed course and adopted the position taken by the unsuccess-

ful intervenors that Indian title to the lands described in the Treaty of Ruby Valley was retained by the Indians. They then sought recognition of their ownership, rather than money damages for the taking. The Temoak Bands petitioned the Secretary of the Interior in February, 1977, for an administrative determination that the Western Shoshone hold equitable title to the treaty lands. The Indians also requested the Commission to stay its proceedings pending the Secretary's determination. The Commission denied the request for a stay, and on August 15, 1977, the Commission announced the completion of proceedings before it and issued its final award. (40 I.C.C. 305.) The Indians appealed the denial of the stay to the Court of Claims, and the United States also filed an appeal. These appeals are still pending before the Court of Claims. The Secretary of the Interior has not thus far made a decision about the administrative determination of title.

The district court held that the 1962 order of the ICC, reported at 11 I.C.C. 387, estopped the Danns from asserting that the Indians retained beneficial ownership of the Western Shoshone's Nevada lands. On appeal, the Danns contend that the 1962 order is not entitled to any preclusive effect against them because (1) the Danns were not parties to the ICC action; (2) the order is not final; (3) the questions of title and taking were not actually litigated in the ICC action; and (4) the title issue involved in this case is not the same as the issue presented before the Commission. For the purposes of this appeal, we assume, without deciding, that the final judgments and orders of the ICC have

preclusive effect under the doctrine of *res judicata*. However, even on that assumption, the doctrine does not foreclose litigation of the title issue in this case. The bar and merger aspects of *res judicata* are inapplicable because no final judgment has been entered. It is therefore unnecessary to resolve the question whether the Danns were or were not "parties" to the ICC litigation by virtue of any representation of the Shoshone Tribes in the litigation.[1] Claims before the ICC proceed in three steps: decision whether the claimant Indians ever had title to the land for which they are seeking compensation; establishment of the value of the lands claimed to have been taken as of the time of taking; and a determination of any offsets against the Indians by the Government. The 1962 order of the ICC relied upon by the district court marked the conclusion of the first phase of the Western Shoshone litigation. This phase of the litigation before the Commission, however, is not deemed a final judgment within the meaning of the ICC Act. "Finality" for this purpose does not attach until the Commission has filed its final report with Congress and the Indians have actually been paid the compensation owed them (25 U.S.C. § 70u.) [2]

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[1] Some difficult issues are presented in deciding the identity of parties question in the context of tribal litigation before the Commission. (See Fort Sill Apache Tribe v. United States, 477 F.2d 1360, 1362 (Ct. Cl. 1973); Cherokee Freedmen v. United States, 161 Ct. Cl. 787 (1963). See also Western Shoshone Legal Defense & Educ. Ass'n v. United States, supra, 531 F.2d 495.)

[2] The title phase of a decision by the ICC is not a final order. (Caddo Tribe of Oklahoma v. United States, 155 F. Supp. 727 (Ct. Cl. 1957).) **Caddo** arose in the context of an attempt to appeal a title-phase decision. Although **Caddo** was directly concerned with the question of finality only for the purpose of determining appealability, the **Caddo** court also commented on the issue preclusion question:

The lack of finality of the 1962 ICC decision is underlined by the rationale of the Court of Claims in rejecting the Dann's right to intervene in the litigation. The court jusified its' affirming denial of intervention by noting that denial would not preclude a later effort by the Western Shoshone to reopen the question of title, even after the proceedings before the ICC had been completed. The court said:

> "It may . . . be noted that the bar of Section 22 does not fall until payment . . . . If the majority of the Identifiable Group wishes to postpone payment, in order to try out the issue of current title, it can, of course, ask Congress to delay making the appropriation and direction which will be necessary to pay the award . . . . That course is still open if the majority of the Identifiable Group can be persuaded to follow it." (*Western Shoshone Legal Defense & Education Ass'n., supra*, 531 F.2d at 503 n. 16.)

Of equal importance from the standpoint of collateral estoppel [issue preclusion], the title issue in this case was neither actually litigated nor actually decided in the proceedings before the ICC. The key question in this case is not whether the Indians had title, but

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[2] **Continued**

"Under the circumstances, the views expressed in the order appealed from have not yet assumed finality, and until final judgment is entered disposing of the entire proceeding, the Commission is at liberty to alter the views therein expressed. Accordingly, there can arise no problem of estoppel by judgment [issue preclusion] for either party." (155 F. Supp. at 738.)

Although the ICC Act was amended in 1960 to preclude appeals of interlocutory determinations establishing liability, the Court of Claims has since held that **Caddo**'s analysis of "what constitutes a final decision within the context of the . . . Act" is still applicable. (Seminol Indians of Florida v. United States, 471 F.2d 614, 615 (Ct. Cl. 1973).)

whether the title that they had was in any way extinguished by the Government. The extinguishment question was not placed in issue in the litigation before the ICC. The title phase of the litigation before the ICC was whether the Indians ever had aboriginal title before the arrival of the white man, and not whether title thereafter had passed to the United Staes. As the Court of Claims observed in its analysis of the title phase of the Western Shoshone suit, "the Government consistently maintained that the Indians never owned the lands they claimed and therefore that the question of title-extinction never arose." (513 F.2d at 500.) Whatever may have been the implicit assumptions by both the United States and the Shoshone Tribes during the litigation before the ICC, the extinguishment question was not necessarily in issue, it was not actually litigated, and it has not been decided.[3]

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[3] The Temoak Bands, in their amicus brief, contend that the voluntary selection of a compensation strategy and rejection of a title recognition strategy, described by the Court of Claims (513 F.2d at 503), never took place. They argue that at the time they brought their action before the ICC and for 25 years thereafter, they had no taking/title choice because they could not have sued the Government for recognition of their title claims. They argue that the ICC had no jurisdiction to quiet title, and quite title relief was not otherwise available to the Western Shoshone because the United States had not yielded its immunity from suit for this purpose. (See, e.g., Malone v. Baldwin, 369 U.S. 643 (1962).) The Temoak Bands contend that an election of remedies did not become possible until the fall of 1976, when Congress amended the Administrative Procedure Act to waive sovreign immunity to suits seeking equitable and declaratory relief for unlawful official actions. (5 U.S.C. §§ 702, 703.) Until the amendment, the Western Shoshone could seek only administrative or judicial relief on the theory that their ownership had never been extinguished and that government officials were unlawfully treating their lands as "public lands." A month after the amendment, the Temoak Bands moved for a stay in the ICC proceedings in order to petition the Secretary of the Interior for administrative determination of their rights. The Temoak Bands' contention is supported by United States v. Creek Nation, 427 F.2d 743,

The judgment is reversed and the cause it remanded to the district court for further proceedings consistent with the views herein expressed.

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[3] Continued

745-48 (Ct. Cl. 1970). We need not and do not decide the contentions of the Temoak Bands at this juncture because it is unnecessary to the rendition of this decision. We mention the argument because it emphasizes the legal difficulties of the Government's contention that the collateral estoppel doctrine should be applied to foreclose the Danns from litigating the extinguishment issue. (Restatement of Judgments 2d § 68.1(b)(ii).)

APPENDIX C

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 326-K

WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA

Plaintiff,

vs.

THE UNITED STATES OF AMERICA

Defendant.

PLAINTIFF'S DISCHARGE OF COUNSEL AND ADDITIONAL MOTION TO STAY PROCEEDINGS

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1. COMES NOW The Temoak Bands of Western Shoshone Indians, Nevada, a federally recognized Reorganization Act tribal government and the exclusive representative of the Western Shoshone Identifiable Group, and hereby notifies the Indian Claims Commission that said Temoak Bands has terminated any contract which may exist between said Temoak Bands and Robert W. Barker, Donald C. Gormley and the Law Firm of Wilkinson, Cragun and Barker, and on its own behalf, and on behalf of the Western Shoshone Identifiable Group, discharges said Robert W. Barker, Don-

ald C. Gormley and the Law Firm of Wilkinson, Cragun and Barker as counsel of record and attorneys for The Temoak Bands of Western Shoshone Indians, Nevada and the Western Shoshone Identifiable Group for the reason that said attorneys have failed to protect the interests of the Western Shoshone Identifiable Group and Plaintiff does not have confidence that said attorneys will act in the best interest of the Identifiable Group in the future.

2. The Temoak Bands of Western Shoshone Indians, Nevada, on its own behalf, and on behalf of the Western Shoshone Identifiable Group reasserts its Motion for a Stay of Proceedings for the additional reason that the Representative Plaintiff and the Western Shoshone Identifiable Group are without counsel and time is needed for the Representative Plaintiff to obtain new counsel to protect its interests before the Commission. The Temoak Bands of Western Shoshone Indians, Nevada, represents to the Commission that it is endeavoring to obtain substitute counsel with due diligence and is petitioning the Secretary of the Interior to assist it in obtainng and approving new counsel and to intervene in the proceedings to protect the interests of the Identifiable Group until such time as substitute counsel enters his appearance.

3. The Temoak Bands of Western Shoshone Indians, Nevada, hereby moves the Commission, supplementing paragraph 1 of its Motion to Stay Proceedings, dated November 11, 1976, to retain the said Temoak Bands of Western Shoshone Indians, Nevada as exclu-

sive representative of the Identifiable Group until such time as a broader based Indian Reorganization Act Government is formed for the reason that no such government currently exists.

The authority to discharge the attorneys and to file this Discharge of Counsel and Additional Motion to Stay Proceedings and further reasons therefore are set out in the attached resolution, duly passed by the Tribal Council of The Temoak Bands of Western Shoshone Indians, Nevada.

DATED this 20th day of January, 1977.

s/ LESLIE BLOSSOM

CHAIRMAN, Business Council of
The Temoak Bands of Western Shoshone Indians, Nevada.
Battle Mountain Tribal Offices
Battle Mountain, Nevada 89820

I HEREBY CERTIFY that I mailed a copy of the foregoing Discharge of Counsel and Additional Motion to Stay Proceedings to Robert W. Barker, 1735 New York Avenue, N.W., Washington D.C., 20006; and to Dean K. Dunsmore, Attorney for Defendant, United States Department of Justice, Washington, D.C., 20530, this 20th day of January, 1977.

s/ LESLIE BLOSSOM

RESOLUTION OF THE BUSINESS COUNCIL OF THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS OF NEVADA

WHEREAS, representatives of the Western Shoshone People originally retained the predecessors of the current claims lawyers for the express purpose of enforcing their rights under the Treaty of Ruby Valley; and, the current claims lawyers and their predecessors have failed and refused to enforce these rights and have derrogated said Treaty of Ruby Valley; and,

WHEREAS, Robert W. Barker, Donald C. Gormley, the firm of Wilkinson, Cragun and Barker have failed to protect the property interests of the Western Shoshone People; and,

WHEREAS, said attorneys have failed to explain to the Western Shoshone People the full consequences of actions taken by said attorneys on behalf of the Western Shoshone Identifiable Group; and

WHEREAS, said attorneys have been unresponsive to the requests made by members of the Western Shoshone Identifiable Group; and,

WHEREAS, said attorneys have placed themselves in a position where their actions on behalf of the Western Shoshone Identifiable Group cannot be effectively controlled by the members of the Identifiable Group; and,

WHEREAS, there appears to be a conflict of interests between said attorneys who appear to be interested only in maximizing the amount of the claim before the Indian Claims Commission and the Western Shoshone People who desire to preserve as far as possible their aboriginal and treaty rights to their sacred ancestral lands; and,

WHEREAS, The Temoak Bands of Western Shoshone Indians, Nevada, has been held by the Indian Claims Commission and the Court of Claims to be the exclusive representative of the Western Shoshone Identifiable Group in prosecuting the claim of the Identifiable Group before the Indian Claims Commission and, as such, has a responsibility to insure that the interests of the Western Shoshone People are not jeopardized; and,

WHEREAS, in the opinion of the Business Council of The Temoak Bands, said attorneys have lost the confidence of the Western Shoshone People; and,

WHEREAS, it is of the greatest importance that the legal representatives of the Western Shoshone Identifiable Group be lawyers who have the confidence of the Western Shoshone and can be relied upon to represent the interests of the Western Shoshone People as these People believe them to be; and,

WHEREAS, no organized and politically responsive entity is known to the Business Council of The Temoak Bands which is capable of acting as exclusive representative of the Western Shoshone Identifiable

Group and therefore the Temoak Bands, in view of its expanding political jurisdiction, should remain as exclusive representative for the Western Shoshone Identifiable Group until such time as a broader based Indian Reorganization Act Government is formed and designated as exclusive representative for the Identifiable Group;

NOW, THEREFORE, BE IT RESOLVED BY THE BUSINESS COUNCIL OF THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA:

1. That any contract which may exist between the Temoak Bands of Western Shoshone Indians, Nevada, and/or The Western Shoshone Identifiable Group and Robert W. Barker, Wilkinson, Cragun and Barker, and any associates thereof, is hereby terminated.

2. That the Chairman is assigned the responsibility of locating prospective replacement counsel and reporting his findings to this council.

3. That the Chairman petition the Secretary of the Interior explaining our plight and requesting assistance in replacing counsel before the Indian Claims Commission and to intervene in the Claim Docket 326-K pending there to protect the interests of the Western Shoshone Identifiable Group.

4. That the Chairman file a document in the Indian Claims Commission discharging Robert W. Barker, Donald C. Gormley and the firm of Wilkinson, Cragun

and Barker as counsel for the Temoak Bands of Western Shoshone Indians, Nevada, and The Western Shoshone Identifiable Group and requesting a stay of proceedings until such time as replacement counsel can enter an appearance.

5. That the Chairman supplement paragraph 1 of the Motion to Stay Proceedings dated November 11, 1976 requesting that The Temoak Bands remain as exclusive representative of the Identifiable Group until such time as a broader based Indian Reorganization Act Government can be formed.

s/EDWARD McDADE

s/MARVIN McDADE

s/LESLIE BLOSSOM

C-8

CERTIFICATION

I HEREBY CERTIFY that the Resolution set forth above was adopted by the Business Council of The Temoak Bands of Western Shoshone Indians of Nevada at a meeting at South Fork, Nevada, on the 14th day of November, 1976, at which a quorum was present, and by a vote of three (3) for and two (2) against.

s/MARVIN McDADE
SECRETARY, Business Council
of The Temoak Bands of Western
Shoshone Indians of Nevada.

s/LESLIE BLOSSOM
CHAIRMAN, Business Council
of The Te-Moak Bands of Western
Shoshone Indians of Nevada

RESOLUTION NO. 77-TM-03

APPENDIX D

TE-MOAK BANDS OF
WESTERN SHOSHONE
P.O. Box 1607
Elko, Nevada 89801

January 19, 1977

Secretary of the Interior
Department of the Interior
Washington, D.C.

Re: Western Shoshone Identifiable Group,
Represented by the Temoak Bands of Western
Shosnone Indians vs. United States
Indian Claims Commission Docket No. 326-K

Dear Mr. Secretary,

I am the Chairman of the Temoak Bands of Western Shoshone Indians which is representing all Western Shoshone people in a claim before the Indian Claims Commission. Supposedly, our tribal council is supposed to be in charge of the litigation and according to the Indian Claims Commission and the Court of Claims we have "elected" to give up our title to our ancestral lands in order to get money damages.

Really, the claim has been run by the claims lawyers who have included lands in the claim that we still claim title to. Despite repeated requests these lawyers have refused to test the title to these lands before including them in the claim. Recently a group of Western Shoshone Indians attempted to assert title to these

lands in a trespass suit but the judge said they couldn't because the lands were included in the claim. The claims lawyer has told us many times that his actions would not affect our title but it has.

There are many strange things about the way these lawyers have operated. They no longer report to us but to a "claims committee" which was elected by just a few Indians and has no rules or any way for the people to control them. These lawyers not only have refused to protect the title to the lands we still have but have fought our people who have tried to do it themselves through the Western Shoshone Legal Defense and Education Association.

We have now fired these claims lawyers and are looking for a replacement. I have been directed by the Business Council to appeal to you to assist us in replacing the lawyers and to intervene in the Indian Claims Commission case and protect our interests in controlling our claim. We feel that the Indian Claims Commission pays more attention to those lawyers who work there all the time than to us.

The United States has moved to dismiss the claim entirely because we have asked the Commission to stay its proceedings until we find out what our rights are. We feel this is very unfair. We think the United States should help us solve our problems instead of taking advantage of our problems with our lawyers.

The United States has told the Commission that they do not have to pay atention to us, that only lawyers

can speak for us. We are told that the Secretary of the Interior can provide legal help to Indians even when the United States is on the other side. Would you please help us. Many of our people do not speak English and are very poor. These lands are very important to our people and our religion. If we lose them our people will no longer be Western Shoshone because Mother Earth is our religion.

I am sending you a copy of the resolution and the paper we are sending to the Indian Claims Commission. I have sent other papers to Mr. Joe Membrino in your solicitor's office.

Respectfully yours,

s/ LESLIE BLOSSOM
Chairman, Temoak Bands of Western
Shoshone Indians

TE-MOAK BANDS OF
WESTERN SHOSHONE
P.O. Box 1607
Elko, Nevada 89801

February 4, 1977

Secretary of the Interior
Department of the Interior
Washington, D.C.

Re: Termination of Attorney Contracts and Attorney-Client Relationship — Western Shoshone Identifiable Group, Represented by the Temoak Bands of Western Shoshone Indians vs. United States, Indian Claims Commission. Docket No. 326-K

Dear Mr. Secretary,

In a letter dated January 19, 1977, I informed you that the Tribal Council of the Temoak Bands of Western Shoshone Indians had terminated any attorney contracts and attorney-client relationship which may have existed between the Temoak Bands and the Western Shoshone Identifiable Group, on the one hand, and Robert W. Barker, Donald C. Gormley, the firm of Wilkinson, Cragun and Barker and any associates, on the other. At the direction of the Tribal Council, I requested your assistance in replacing these lawyers.

Since the sending of this letter and the filing of our Discharge of Counsel with the Claims Commission, I have been informed that Mr. Barker is refusing to acknowledge our right to terminate his representation of the Temoak Bands and the Identifiable Group for which the Temoak Bands is exclusive representative. Mr. Barker has filed a pleading in the Indian Claims Commission stating among other things that he has not been discharged because no action has been taken by the Secretary of the Interior and that we have not requested such action.

It is our opinion that the Tribal Council of the Temoak Bands of Western Shoshone Indians has the power to choose which attorneys represent the Temoak Bands and, as exclusive representative of the Western Shoshone Identifiable Group, which attorneys represent the Identifiable Group. We have property exercised that power under our Tribal Constitution

However, in the event that the discharging of the attorneys does require some action by you, or your representative, I hereby request, under authority of the Resolution of the Tribal Council, that you immediately take any action necessary to terminate any attorney contracts and any attorney-client relationship which may exist between the Temoak Bands of Western Shoshone Indians and the Identifiable Group it represents, and Robert W. Barker, Donald C. Gromley, the firm of Wilkinson, Cragun and Barker, and any associates of theirs.

In addition to the reasons that are set out in my

previous letter and resolution attached to that letter, we state as further cause for termination that the attached pleading filed in the Indian Claims Commission is clearly inconsistent with any attorney-client relationship between Mr. Barker and the Temoak Bands. Not only does that pleading attack the position adopted by the Temoak Bands, but adds insult to injury by designating the pleadings filed on behalf of the Temoak Bands, under authority of attached resolutions of the Tribal Council, as pleadings "filed by Mr. Blossom". Mr. Barker continues to ignore actions of the Tribal Council and implies that such action are taken by me as a private individual.

The Temoak Bands will not tolerate the arrogance of Mr. Barker and his continued resistance to our wishes and interests while claiming to act as our attorney. The Temoak Bands of Western Shoshone Indians respectfully demands that you take all action necessary to stop Mr Barker and his associates from acting as attorney for the Temoak Bands and the Identifiable Group it represents.

Respectfully yours,

LESLIE BLOSSOM
Chairman, Temoak Bands of Western
Shoshone Indians

cc: Joe Membrino, Solicitor's Office
Robert W. Barker
LB:M

APPENDIX E

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office Of The Solicitor
Washington, D.C. 20240
February 24, 1977

Leslie Blossom, Chairman
Te-Moak Bands of Western
Shoshone Indians
P.O. Box 1607
Elko, Nevada 89801

Dear Mr. Blossom:

This is in further response to your letter of February 4, 1977, in which you asked whether termination of claims attorney contract I-1-Ind. No. 42013, Indians Claims Commission Docket 326-K, requires Departmental action to be effective.

It is the position of this Department, generally, that no tribe can or should be compelled to be represented by an attorney against its wishes.

The tribe's right to discharge its attorney is implied in its employment contract and no attorney whose contract has been terminated may insist that the attorney-client relationship continue after the client has discharged him. This position is well supported by the law and by the Code of Professional Responsibility which sets standards of conduct for attorneys.

Although an attorney may be discharged for any reason, the client may be responsible for compensating the attorney for the value of his services up until the time he is discharged.

The provision in contract No. 42013 which states that the agreement may be terminated by the Secretary of the Interior "only for proper cause, after a hearing . . ." is merely a limitation on the *Secretary's* power to discharge the claims attorney. It is not the exclusive means by which the Shoshone can discharge Attorney Barker. For the Secretary to insist upon continuation of an attorney's employment by an Indian tribe against that tribe's wishes would conflict with settled principles of law and ethics and clearly would be inconsistent with the Government's policy of self-determination for Indian tribes.

It should be understood, however, that the Department expresses no opinion as to whether the recent action of the Te-Moak Bands is effective to terminate attorney contract No. 42013 in whole or in part. That issue is pending before the Indian Claims Commission and, as stated previously, we believe that that forum is the appropriate one to decide the question.

Sincerely,

William A. Gershuny
Acting Associate Solicitor
Division of Indian Affairs

cc: Robert W. Barker, Esq.
Field Solicitor, Phoenix
BIA Area Office, Phoeinx
BIA Superintendent, Eastern Nevada Agency
Assistant Attorney General, Lands &
Natural Resources Division